IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 348 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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POPATBHAI RESHABHAI BEGADIA AND ANOTHER
Versus
STATE OF GUJARAT

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Appearance :
MR UA TRIVEDI for MR AS TRIVEDI for Appellants.
MS HANSA PUNANI, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 05/12/2007

ORAL JUDGMENT

1. This appeal arises out of judgment and order dated 25th February 1997 rendered by learned Additional Sessions Judge, Palanpur in Sessions Case No.88 of 1996.

2. The appellants are the original accused, who were charged with

offences punishable under Section 302 read with Section 34 of the Indian Penal Code. Learned Additional Sessions Judge by the impugned judgment convicted both the accused of offences punishable under Section 304, Part II of the Indian Penal Code read with Section 34 of Indian Penal Code. He sentenced them to undergo rigorous imprisonment for five years and to pay fine of Rs.10,000/- and to suffer simple imprisonment in case of default in payment of fine.

3. From the charge, Exh.3, framed against the accused, it can be seen that the prosecution case was that on 27th May 1996 at about 3 O' Clock at night when deceased Mohan Puna was sleeping in open near his house at village-Taarangada, the accused gave him kick blows and thereafter lifted the deceased and banged him on stone at the doorstep of one Naran Puna. In the resultant injury, Mohan Puna expired. Accused were, therefore, charged with offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

4. P.W.1, Dr.Raniben Chauhan, was examined at Exh.7. She had treated appellant no.1, who had received minor injuries on his right foot during the scuffle.

5. P.W.2, Dr.Jayantilal Patel, Exh.10 was the medical officer at Ambaji Hospital, who had carried out the postmortem on the body of deceased, Mohan Puna. He had produced postmortem report, Exh.12. The doctor had found two injuries on the body of the deceased, (i) swelling at the back of the head about 3 cms. in size and blueish in colour, (ii) lacerated wound of 6 cms. X 2 cms. on the right hand.

5.1 Significantly, there were no other injuries according to this doctor on the body of the deceased.

6. P.W.3, Jatabhai, Exh.15 was the complainant. He had, however, turned hostile.

7. P.W.4, Savitaben, Exh.17 was daughter of the deceased. She was only 13 years of age. She stated that on the date of the incident when she was sleeping near his father the accused had come there at night and tried to lift her, upon which she started crying. She also stated that upon hearing her cries, her mother also woke up. The accused put her down but lifted her father and banged him on a stone. This witness, however, in the cross-examination agreed that she was tutored by her mother and other relatives at the time of giving her statement to the police. She also agreed that before coming to the Court also, she was tutored. Learned trial Judge tried to explain her the situation but she stated that she had given the reply as told by others. Her testimony, therefore, cannot be relied upon.

8. Rakhmaben Mohan, P.W.5, Exh.18 was the wife of the deceased, who stated that on the date of the incident, her husband was sleeping in the open ground in front of the house of Narna Puna. This open ground is common to their house and to the house of Narna Puna. Upon hearing the cries of her daughter, she woke up and saw that accused no.1, appellant no.1 herein, banged her husband on a stone at the doorstep of Narna Puna. At that time no one else was present. She started crying, upon which, Jata and Chuna had come. On account of the fall, her husband received injuries at the back of the head and on his hand. She identified the accused in the Court.

9. P.W.7, Sona Bhikha, Exh.22, stated that upon hearing the commotion at about 3 O' Clock at night he rushed to the spot and saw

that the accused were physically fighting with Mohan Puna and were giving fist and kick blows. They (i.e. he and others), therefore, separated them after which the accused lifted Mohan Puna and banged him against the stone in front of the house of Narna Puna. He also identified the accused before the Court and stated that since they were the residents of the same village, he knew them before hand.

10. P.W.9, Harpalsinh Rathod was the investigating officer, who had carried out the investigation. He was examined at Exh.30.

11. From the evidence on record, it can be seen that the testimony of the complainant, P.W.3, would be of no avail to the prosecution since he had turned hostile. P.W.4, Savitaben also stated in no uncertain terms that she was tutored by her mother and other relatives at the time of giving her statement to the police as well as before giving her evidence before the Court. She was a girl barely 13 years of age and such tutoring could have considerable impact on her deposition. It would, therefore, not be safe to rely on her testimony also.

12. Evidence of P.W.5, Rakhmaben, however, is of considerable importance. She is wife of deceased Mohan Puna. She was sleeping right outside her house on the night of the incident. Her husband and daughter, Savita, were sleeping in the open ground in front of the house of Naran Puna. From the evidence of the witnesses as well as from the map, Exh.28 on record, it can be seen that two places are situated at a short distance from each other. Her statement that this open ground is common for both the houses is also borne out from the map. This is also supported by testimony of witness, Sonabhai, P.W.7. In short, Rakhmaben was the natural witness whose presence at the scene of the incident cannot be doubted. As per her say, she woke up on hearing her

daughter cry. She went to the spot. She saw that accused no.1 lifted her husband and banged him on a stone, thereby causing injury on the head and on a hand. I have no reason to disbelieve version of this witness. Nothing substantial has come out from the cross-examination. Althroughout though suggestion is made by the defence that there was previous enmity between two sides leading to false accusation but no concrete evidence has come on record in this regard. The injuries described by the witness is also supported by the medical evidence. P.W.2, Dr.Jayantilal, who had carried out the postmortem also noted these injuries. PW.1, Dr.Raniben had also found minor injuries on the accused no.1. His involvement is, therefore, fully established.

13. Question of involvement of accused no.2 in the overt act of causing injury to the deceased, however, remains to be examined. His presence is established through testimony of P.W.5, Rakhmaben as also other witnesses including P.W.7, Sonabhai. Though P.W.7, Sonabhai narrated that the deceased was banged against the stone by both the accused, this is in stark contrast to the deposition of Rakhmaben. She was the first to reach the scene of the incident. She is wife of the deceased. She stated that it was only accused no.1, who had committed the said act. She also did not narrate anything about the accused having given beating to the deceased. Doctor also did not notice any other injuries on the body of the deceased.

14. It would thus appear that though accused no.2 was also present at the time when the incident took place, he had not played any overt act of causing injuries to the deceased. He had neither given any blows to the deceased nor helped accused no.1 to bang the deceased on the stone. His mere presence could not lead to his involvement in the offence even with the aid of the provisions contained under Section 34 of the Indian

Penal Code. His conviction, therefore, in my view, was erroneous.

15. Accused no.1 had actually given the blow which caused death of the deceased. He was convicted under Section 304, Part II, IPC. Said provision makes punishable if the act of causing death is done with the knowledge that it is likely to cause death but without any intention to cause death or to cause such bodily injury as is likely to cause death.

16. Considering the act attributed to accused no.1 and considering the nature of injuries caused by him, it cannot be said that he committed such injury which he ought to have known is likely to cause death. Doctor, P.W.2, did not find any fracture of the skull. In fact, in his opinion, death was on account of internal hemorrhage and excess bleeding. Conviction of appellant no.1 under Section 304, Part II, IPC is, therefore, not justified.

17. It can, however, be denied that he caused grievous hurt and thereby committed offence punishable under Section 325 of the Indian Penal Code.

18. Appellant no.1 was aged about 18 years on the date of the incident. It is stated that he had already suffered imprisonment for a period of about 11 months. There was no past antecedent of criminal nature. Since commission of offence also he is not stated to have been involved in any other offence. It would, therefore, be appropriate to reduce sentence to one already undergone by him. The imposition of fine of Rs.10,000/- by learned Judge considering the socio-economic background of appellant no.1 also appears to be harsh.

19. Under the circumstances, by partially allowing this appeal, following order is passed:

(1) Conviction of appellant no.2, original accused no.2 is set aside. He is acquitted of the charge.

(2) Conviction of appellant no.1 is converted to that under Section 325 of the Indian Penal Code and his sentence is reduced to one already undergone.

(3) Order for payment of fine of Rs.10,000/- is substituted by payment of fine of Rs.2,000/- and simple imprisonment for three months in default of payment of fine.

20. With the above modification in the impugned judgment, appeal stands disposed of.

(Akil Kureshi, J.)

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